

DEPARTMENT OF LABOR**Employee Benefits Security Administration**

RIN 1210-AB51

Proposed Revision of the Form M-1**AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Notice of proposed form revisions.

SUMMARY: This document announces proposed revisions to the Form M-1, Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs). The revisions can be viewed on the Employee Benefits Security Administration's (EBSA) Web site at www.dol.gov/ebsa. The proposed form is substantively different from previous versions of the Form M-1 and may not be used for filing purposes. Elsewhere in this edition of the **Federal Register**, EBSA is publishing a Notice of Proposed Rulemaking. Those rules would amend the existing MEWA regulations to implement the registration requirement added to section 101(g) of Title I of the Employee Retirement Income Security Act of 1974, (ERISA), as amended by the Patient Protection and Affordable Care Act (Affordable Care Act) as well as to enhance compliance, enforcement, and protection of employer-sponsored health benefits. The proposed form and the accompanying instructions would facilitate the filing requirements for MEWAs under ERISA.

DATES: Written comments on the Form M-1 and Instructions should be submitted to the Department of Labor on or before March 5, 2012.

ADDRESSES: Written comments may be submitted to the address specified below. All comments will be made available to the public. **WARNING:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Department of Labor. Comments to the Department of Labor, identified by RIN 1210-AB51, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* E-OHPSCAM-1Revisions.EBSA@dol.gov.

- *Mail or Hand Delivery:* Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, *Attention:* RIN 1210-AB51; Revision of Form M-1.

Comments received by the Department of Labor will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and made available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Kevin Horahan or Suzanne Bach, Office of Health Plan Standards and Compliance Assistance, at (202) 693-8335. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:**I. Background**

The Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191, 110 Stat. 1936) (HIPAA) amended ERISA to provide for, among other things, improved portability and continuity of health insurance coverage. HIPAA also added section 101(g) to ERISA, 29 U.S.C. 1021(g), providing the Secretary with the authority to require, by regulation, annual reporting by MEWAs that are not ERISA-covered plans. The Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111-148, 124 Stat. 119 (2010), amended section 101(g) of ERISA to require that such MEWAs register with the Department prior to operating in a State. Specifically, this section now provides that the Secretary shall, by regulation, require multiple employer welfare arrangements providing benefits consisting of medical care (within the meaning of section 733(a)(2) of ERISA, 29 U.S.C. 1191b(a)(2)) which are not ERISA-covered group health plans to register with the Secretary prior to operating in a State and may, by regulation, require such multiple employer welfare arrangements to report, not more frequently than annually, in such form and such manner as the Secretary may require for the purpose of determining the extent to which the requirements of part 7 of subtitle B of title I of ERISA are being carried out in connection with such benefits.

The term "multiple employer welfare arrangement" is defined in section 3(40) of ERISA, 29 U.S.C. 1002(40) in pertinent part, as an employee welfare benefit plan, or any other arrangement

(other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing medical benefits to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association. For purposes of this definition, two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group. The term "control group" means a group of trades or businesses under common control, and the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b) of ERISA, 29 U.S.C. 1301(b), except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent.¹

In 2000, the Department published an interim final rule implementing the MEWA reporting requirement. 65 FR 715 (Feb. 11, 2000). The interim final rule generally required the administrator of a MEWA, whether or not an ERISA-covered group health plan (and certain other entities that offer or provide health benefits to the employees of two or more employers) to file the Form M-1 with the Secretary. The purpose of this form is to allow the Department to determine whether the requirements of part 7 are being met. A final rule implementing the MEWA reporting requirement was published in the **Federal Register** on April 9, 2003 at 68 FR 17494. The original reporting requirement responded to a 1992 recommendation of the General Accounting Office (GAO). See

¹ This provision was added to ERISA by section 302(b) of the Multiple Employer Welfare Arrangement Act of 1983, Public Law 97-473, 96 Stat. 2611, 2612 which also amended section 514(b) of ERISA, 29 U.S.C. 1144(a). Section 514(a) of ERISA provides that state laws that relate to employee benefit plans are generally preempted by ERISA. Section 514(b) sets forth several exceptions to the general rule of section 514(a) and subjects employee benefit plans that are MEWAs to various levels of state regulation depending on whether the MEWA is fully insured. Sec. 302(b), Public Law 97-473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6)).

“Employee Benefits: States Need Labor’s Help Regulating Multiple Employer Welfare Arrangements,” March 1992, GAO/HRD–92–40. In that report, the GAO detailed a history of fraud and abuse by some MEWAs and recommended that the Department develop a mechanism to help States identify MEWAs. The problems pointed out in that report continued to exist at the time of the publication of the interim final and final reporting rules and by all accounts, as evidenced by the amendments made by the Affordable Care Act to section 101(g) of ERISA, persist to this day. The proposed rules published elsewhere in today’s edition of the **Federal Register** would amend the final rule as well as the rules related to annual reports required of MEWAs that are group health plans and solicit comments regarding the restructured reporting requirements.

The Affordable Care Act was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (the Reconciliation Act), Public Law 111–152, 124 Stat. 1029, was enacted on March 30, 2010. The Affordable Care Act and the Reconciliation Act reorganize, amend, and add to the provisions in part A of title XXVII of the Public Health Service Act (PHS Act), 42 U.S.C. 300gg–1 et seq., relating to group health plans and health insurance issuers in the group and individual markets. The term “group health plan” includes both insured and self-insured group health plans.² The Affordable Care Act adds section 715(a)(1) to ERISA, 29 U.S.C. 1185d(a)(1), and section 9815(a)(1) to the Internal Revenue Code (the Code), 26 U.S.C. 9815(a)(1), to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by this reference are sections 2701 through 2728. PHS Act sections 2701 through 2719A are substantially new, though they incorporate some provisions of prior law. PHS Act sections 2722 through 2728 are sections of prior law renumbered, with some, mostly minor, changes. Section 1251 of the Affordable Care Act, as modified by section 10103 of the Affordable Care Act and section 2301 of the Reconciliation Act, 42 U.S.C. 18011, specifies that certain

plans or coverage existing as of the date of enactment (*i.e.*, grandfathered health plans) are only subject to certain provisions. The Affordable Care Act amended section 101(g) of ERISA to require MEWAs that provide benefits consisting of medical care (within the meaning of section 733(a)(2) of ERISA) which are not group health plans to register with the Secretary prior to their operating in a State, in addition to reporting annually regarding their compliance with part 7 of ERISA including the PHS Act market reforms incorporated by reference in section 715 of ERISA. The Notice of Proposed Rulemaking published elsewhere in today’s **Federal Register** implements the 101(g) MEWA registration mandate which requires MEWAs to report compliance with the part 7 rules including the PHS Act sections 2701 through 2728.

In addition to the relevant provisions of HIPAA and the Affordable Care Act, other laws are also set forth in part 7 with which MEWAs must annually report compliance. The Mental Health Parity Act of 1996 (Title VII of Pub. L. 104–204, 110 Stat. 2944) (MHPA) amended ERISA to provide parity in the application of annual and lifetime dollar limits for certain mental health benefits with such dollar limits on medical and surgical benefits. The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (Div. C, Subtitle B of Pub. L. 110–343, 122 Stat. 3765) amended ERISA by expanding the MHPA rules to include parity for substance use disorders benefits. 29 U.S.C. 1185a. It also required parity in financial requirements and treatment limitations. The Newborns’ and Mothers’ Health Protection Act of 1996 (Title VI of Pub. L. 104–204, 110 Stat. 2935) amended ERISA to provide new protections for mothers and their newborn children with regard to the length of hospital stays in connection with childbirth. 29 U.S.C. 1185. The Women’s Health and Cancer Rights Act of 1998 (Title VII of Pub. L. 105–277, 112 Stat. 2681–436) amended ERISA to provide individuals new rights for reconstructive surgery in connection with a mastectomy. 29 U.S.C. 1185b. The Genetic Information Nondiscrimination Act of 2008 (Pub. L. 110–233, 122 Stat. 881) amended ERISA to prohibit the use of genetic information to adjust group premiums or contributions, prohibit the collection of genetic information, and prohibit requesting individuals to undergo genetic testing. 29 U.S.C. 1182. Michelle’s Law (Pub. L. 110–381, 122 Stat. 4081 (2008)) amended ERISA to

prohibit group health plans and issuers from terminating coverage for a dependent child, whose enrollment in the plan requires student status at a postsecondary educational institution, if the student status is lost as a result of a medically necessary leave of absence. 29 U.S.C. 1185c.

II. Discussion of the Proposed Revisions

A. Proposed Regulatory Amendments

The Department is simultaneously publishing a Notice of Proposed Rulemaking in today’s **Federal Register** that, upon adoption, would amend the existing Form M–1 requirements under § 2520.101–2, propose implementation of new registration requirements enacted by the Affordable Care Act, and propose amendments to the Department’s annual reporting regulations to strengthen the Form M–1 requirements for all MEWAs. The new registration requirement is an important new enforcement tool to help Federal and State regulators better identify and monitor MEWAs and gives the Secretary authority to collect additional information than had been collected in previous versions of the Form M–1, including custodial and financial information. To reflect the proposed regulatory amendments to the Form M–1 reporting requirements, the Department is proposing the following revisions.

B. Overview of Form Revisions

This document announces the availability of the proposed revisions to the Form M–1, Form for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs), for comment. The proposed revisions to the Form M–1 may be viewed on EBSA’s Web site at <http://www.dol.gov/ebsa>. The proposed revisions result in a Form M–1 that is substantially different from previous versions of the Form M–1.

Part I of the proposed Form M–1 was revised to implement the new statutory and proposed regulatory requirements that MEWAs must register with the Department prior to operating in a State. Filers would be required to indicate the type of filing entity (*i.e.* plan MEWA, non-plan MEWA, or an ECE) and the type of filing being submitted (*i.e.* annual report, registration, origination, or request for extension).

Part II of the proposed Form M–1 would require more extensive custodial and financial information than requested in previous versions of the Form M–1. In addition to providing information regarding the entity’s administrator and entity sponsor, the

² The term “group health plan” is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term “health plan”, as used in other provisions of title I of the Affordable Care Act. The term “health plan” does not include self-insured group health plans.

Form M-1 would require an entity to report individuals associated with the entity as follows: agent for service of process or registered agent; members of the Board, officers, trustees, custodians; promoters and/or agents responsible for marketing; any person, financial institution or other entity holding assets; any actuaries providing services; any third party administrator (TPA) with whom the MEWA or ECE has a contract with; any person or entity that has authority or control over the assets of the MEWA or ECE or over assets paid to the entity by plans or employers for the provision of benefits; any person or entity that has discretionary authority control, or responsibility with respect to the administration of the MEWA or ECE or any benefit program offered by it; and information regarding any merger with another filing entity. Additionally, the proposed Form M-1 would require the filing entity to respond to several "yes or no" questions with respect to the entity's assets and the fiduciaries responsible for those assets.

Part II of the proposed Form M-1 includes information previously contained in Part III of the Form M-1 and includes several modifications which capture information regarding entities that are operating in a State. Pursuant to the definition of "operating" in the proposed regulations published elsewhere in today's edition of the **Federal Register**, these modifications may apply to entities that are not actively providing coverage.

The information collected in Part III of the proposed Form M-1 (previously designated as Part IV) remains generally unchanged, except information regarding legal proceedings is now included in Part II.

Corresponding changes were also made to the Form M-1 Instructions including the line-by-line instructions to reflect these revisions to the Form M-1. More details on filing requirements are available in the Notice of Proposed Rulemaking published elsewhere in this edition of the **Federal Register**. The Self Compliance Tool, which may be used to help assess an entity's compliance with part 7 of ERISA, will continue to be included in the Form M-1 instructions. The current version of that document is available at <http://www.dol.gov/ebsa>. The Self Compliance Tool undergoes changes to reflect the current provisions of part 7 as they become effective. While we are accepting comments on the Form M-1 and the Instructions, which include the Self-Compliance tool, please refrain from commenting on the portion of the instructions referencing the Self Compliance Tool in that regard.

III. Paperwork Reduction Act Statement

According to the Paperwork Reduction Act of 1995 (Pub. L. 104-13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by the Office of Management and Budget (OMB) under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. *See* 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 44 U.S.C. 3512.

This notice would revise the information collection request (ICR) titled the "Annual Report for Multiple Employer Welfare Arrangements (Form M-1) approved by OMB under OMB Control Number 1210-0116, which currently is scheduled to expire on March 31, 2013. For the hour and cost burden associated with this revision, please see the proposed regulation titled "Filings Required of Multiple Employer Welfare Arrangements and Certain Other Entities that Offer or Provide Coverage for Medical Care to the Employees of Two or More Employers," which is published elsewhere in today's issue of the **Federal Register**.

Statutory Authority: 29 U.S.C. 1021-1024, 1027, 1029-31, 1059, 1134 and 1135; Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010). Sec. 2520.101-2 also issued under 29 U.S.C. 1181-1183, 1181 note, 1185, 1185a-d, and 1191-1191c. Sec. 2520.103-1 also issued under 26 U.S.C. 6058 note. Sec. 2520.101-6 also issued under § 502(a)(3), 120 Stat. 780, 940 (2006); Secs. 2520.102-3, 2520.104b-1 and 2520.104b-3 also issued under 29 U.S.C. 1003, 1181-1183, 1181 note, 1185, 1185a-d, 1191, and 1191a-c. Secs. 2520.104b-1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788. Sec. 2520.101-3 is also issued under 29 U.S.C. 1021(i).

Signed at Washington, DC this 28th day of November, 2011.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

RIN 1210-AB51

Proposed Revision of Annual Information Return/Reports

AGENCY: Employee Benefits Security Administration, Department of Labor
ACTION: Notice of proposed forms revisions.

SUMMARY: This document contains proposed revisions to the Form 5500 Annual Return/Report filed by administrators of employee benefit plans. The proposed revisions are intended to enhance the Department of Labor's ability to enforce the reporting requirements for multiple employer welfare arrangements (MEWAs) under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

DATES: Written comments on the proposed regulations should be submitted to the Department of Labor on or before March 5, 2012.

FOR FURTHER INFORMATION CONTACT: Janet K. Song, Office of Regulations and Interpretations, Employee Benefits Security Administration, Department of Labor, at (202) 693-8523. This is not a toll-free number.

ADDRESSES: Written comments may be submitted to the address specified below. All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Comments may be submitted to the Department of Labor, identified by RIN 1210-AB51, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* e-ORI@dol.gov.
- *Mail or Hand Delivery:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attention: RIN 1210-AB51.

Comments received by the Department of Labor will be posted without change to <http://www.regulations.gov> and <http://www.regulations.gov>